

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION

4 UNITED STATES OF AMERICA,)
5)
6 -VS-) DOCKET NO. 1:18-CR-00181-MLB-CMS
7 BENJAMIN JENKINS,)
8 DEFENDANT.)

9 **TRANSCRIPT OF TELEPHONE CONFERENCE**
10 **BEFORE THE HONORABLE MICHAEL L. BROWN**
11 **UNITED STATES DISTRICT JUDGE**
12 **DECEMBER 23, 2019**

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14 APPEARANCES:

15 ON BEHALF OF THE GOVERNMENT: (VIA TELEPHONE)
16 PAUL JONES, ESQ.
17 ASSISTANT UNITED STATES ATTORNEY

18 ON BEHALF OF THE DEFENDANT: (VIA TELEPHONE)
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24 OFFICIAL COURT REPORTER
25 UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

1 (11:12 A.M.)

2 THE COURT: All right. Good morning, everyone. We are
3 here on US vs. Jenkins, 18-CR-181.

4 Can I please have appearances starting with the
5 Government.

6 MR. JONES: Paul Jones. Good morning, your Honor.

7 THE COURT: Good morning.

8 MS. STRICKLAND: And good morning, your Honor, Sydney
9 Strickland for Mr. Jenkins.

10 THE COURT: So I have read the pleading, and I wanted to
11 give you my thoughts on this. Is Ms. Timmers on the phone?

12 MS. STRICKLAND: No, your Honor, she is not. I believe
13 she may already be on her way to Indiana on leave for the holiday.

14 THE COURT: Well, I'm just going to say as a jumping-off
15 point, I do not understand why this was filed what sounds like on
16 her way out the door. And I resent the fact that -- maybe I
17 shouldn't say I resent it. It's a little shocking to me that
18 she's now not available to address that which she foisted on
19 everybody else. And I read the one paragraph of explanation on
20 page 15, and I found it greatly lacking.

21 I don't understand -- I understand that y'all were
22 dealing with Mr. Jenkins's potential mental health issues, but I
23 thought that issue had been resolved some time ago. Indeed at the
24 very beginning of the post-assessment briefing I think I got a
25 notice from you all that you were not pursuing that, so that can't

1 be the reason for the late notification. I have to assume that
2 you all have been engaged in trial preparation prior to this week
3 or last week, so that really can't be the reason.

4 And, frankly, the issues that you raise in this motion
5 are kind of evident from a very beginning -- I'm not suggesting by
6 saying evident that they are legitimate or they have a basis under
7 the law, but they seem to be the kind of issues that would jump
8 out at somebody on almost the very first reading of the indictment
9 and certainly not something that would take a significant level of
10 "trial preparation" in order to reveal what you all claim to be
11 lacking.

12 To the extent there's any lacking in the indictment,
13 it's not something that would appear only after extensive trial
14 preparation. So I can't imagine why Ms. Timmers thought to file
15 this on the Sunday before -- isn't that right? Yeah. She filed
16 this on Sunday before I guess leaving town and I guess for her the
17 last day of the year before she was going to be trying this case
18 at the start of the second week of the year.

19 And I can't -- I'm especially flummoxed by this given
20 the way the Government has tried to schedule this case, not with
21 the short delay that was originally sought by the defendant but
22 with a longer delay in order to accommodate the schedule of
23 alleged victims who are home from college and would like to deal
24 with this before returning to college.

25 So I don't know that there's much to be done about this,

1 Ms. Strickland, or if you want to respond on behalf of
2 co-counsel's efforts, but it seems to me that this was done at a
3 very inopportune time, but we now have to deal with that.

4 MS. STRICKLAND: Your Honor, I -- do you want me to
5 respond, your Honor?

6 THE COURT: If you want to, you can. I've given you my
7 thoughts. And if you have something that goes directly to point,
8 I will hear it, although it doesn't make much of a difference
9 because you all have raised issues that I think need to be
10 addressed regardless of when you've raised them and regardless of
11 how inconveniently you've done so.

12 MS. STRICKLAND: Yes, your Honor. I mostly just want to
13 apologize. We got it filed as soon as we possibly could after
14 realizing the issue. And I know that's not an excuse for any of
15 it, I think you're completely right in everything you said, and I
16 just want to apologize.

17 THE COURT: Okay. All right. Well, now, it is maybe
18 Mr. Jones who is going to -- who I want to hear from next.

19 I have read this and when we look at the combined claim
20 of the insufficiency of the indictment or alternatively for a bill
21 of particulars, I am inclined, Mr. Jones, to -- I'm inclined to --
22 I'll tell you how I'm inclined to rule, but if you think that I am
23 wrong and that there is some benefit to briefing, I will also give
24 you time to brief it.

25 My initial idea when I got this was to give you until

1 like the 2nd to review it, and then I would rule on it, I would
2 have everybody here like the 6th. But that only is a week before
3 trial and I'm not sure -- then I went ahead and I read it again,
4 and I am inclined to rule this way:

5 I am inclined to deal with the issue raised through a
6 bill of particulars in that to the extent there is certain images
7 that you intend to base your claim on for each of the charges, I'm
8 inclined to require you to identify those specific images.

9 I'm also inclined to require the Government to identify
10 the type of conduct it is alleging. There is in some of these
11 instances not a lot of difference in the words of the statute,
12 like employ or use. And then there's not so much between persuade
13 and induce or entice. There might be some difference with coerce.
14 But it seems to me as though the statute encompasses sort of at
15 least three spots along a spectrum from employ to coerce and that
16 the Government ought to identify where on the spectrum it's going
17 to fall in its allegations to the jury.

18 I don't expect the Government would be required to
19 identify one term, and it could say it's going to use all of them,
20 because as I've said, they're not so distinct that the -- an
21 argument or evidence of, let's say, employing could also be the
22 same as the evidence or the argument about inducing, enticing and
23 coercing. But to the extent that there is some difference there,
24 I am inclined to suggest it.

25 And then for the attempted production, I think that

1 maybe there is a requirement to the extent there's not an image
2 that was sent, maybe some illumination is required in that
3 instance.

4 I am concerned as to the requirement of unanimous
5 verdict. I do think that we can address that through jury
6 instructions and instructing the jury as to how they have to reach
7 their verdict.

8 MR. JONES: Your Honor, I'm not sure that's ever -- I
9 think this is going to require quite a bit of briefing from the
10 Government. This is -- I'm definitely put off by the extremely
11 late notice of this where this could not have just been filed two
12 months earlier but there was earlier counsel. This is the type of
13 stuff that's dealt with usually in pretrial motions.

14 THE COURT: Right.

15 MR. JONES: So this is -- and we're getting deep into
16 trial prep, so this is a -- quite a diversion of energy to try to
17 respond to this.

18 I'm not sure -- I understand what the Court is saying.
19 I don't think there's any -- that this statute carries any
20 requirement of unanimity in -- for like what method the defendant
21 used. And the problem is that with one victim, there can be
22 multiple methods used for -- depending upon the situation. And
23 the -- so because this was not just a -- this is not just a
24 one-time thing where the defendant contacted each girl and then
25 had limited communications and then through one means obtained the

1 child pornography from the victim, this is the -- there was
2 ongoing communications with the girls. And then the
3 communications themselves, they could be coercive, they could be
4 enticing and they could be using -- varying on -- it depends on
5 the communications given the context of what's happening.

6 So I think this is actually very -- it's quite difficult
7 to -- even if the Court is inclined to grant a bill of
8 particulars, that's going to be a herculean effort on the part of
9 the Government to try to fit it in.

10 Also, I don't think -- like I said, I don't think
11 there's any legal requirement that the jury be unanimous as to
12 which method the defendant used.

13 THE COURT: Let me be clear on that. I think that
14 that's probably right. I think that when they allege those words
15 they are not -- when the statute alleges those words, they are
16 identifying the conduct. I don't think it requires unanimity as
17 to each -- as to the type of conduct we can -- to the extent that
18 that is required, we could identify that or deal with that at the
19 jury instruction portion.

20 But I say that in part because I don't think a jury -- I
21 think the jury is not required to pull apart what is induce or
22 what is entice or what is persuade. I think that is all meant to
23 get at the same concept. And those words are so similar in
24 meaning that I agree with you, that there's not a requirement of
25 unanimity.

1 But how about for the distribution counts for the
2 images, isn't there a requirement that there be some unanimity as
3 to an image -- maybe not -- if not unanimity, they need to know
4 what images you are going to allege to the jury constitute the
5 illegal images?

6 MR. JONES: That the -- who needs to know, the defendant
7 or the jury needs to know?

8 THE COURT: Well, the defendant. So to the extent you
9 have distribution, that he did distribute at least one visual
10 depiction of a minor, you know, they might argue whether the
11 images are illegal in nature or whether they are that person or
12 what exactly -- you know, some other type of defense. Aren't they
13 entitled to know the images that you are going to say -- even if
14 these are the images for this victim, these are the images for
15 that victim that we say are illegal in nature and content?

16 MR. JONES: They're -- yes, they're entitled to know
17 that. I don't think, though, that that's necessarily the point of
18 a bill of particulars. In a normal distribution case involving
19 child pornography we might have tens of thousands of images and
20 videos and we're not going to just list out all of the -- even
21 just the file names, let alone the content, of every file itself.

22 And the -- so, I don't -- although they're entitled to
23 know it -- and this is where it becomes kind of tricky because we
24 can't turn over the evidence. But I do want to make it clear for
25 the record that we have made the evidence fully available to

1 defense counsel whenever they want to come in and see it. They
2 have come in several times. And on a different case I did see
3 Ms. Timmers and I told her that if she needs to come back and
4 wants to come back and review the evidence, just let us know and
5 we'll set her up. So the evidence is available and has been
6 available for defense counsel to review and defense counsel has
7 come in to review the evidence so far.

8 The distribution counts themselves, it's -- the -- I'm
9 not quite sure where -- you know, how to respond to what the Court
10 is saying. I don't think that -- you know, I don't think that
11 that can be a proper form for a bill of particulars in this case.

12 The -- you know, and also I would tell the Court that if
13 the Court is going to require the Government to file a bill of
14 particulars, we would want to do it under seal because it's going
15 to involve probably a lot of the information involving the victims
16 depending on -- whether we do it by file name or whether we do it
17 by the conduct that's alleged.

18 And the -- but, at any rate, though, the -- it's
19 problematic given the nature of this that we can't just turn it
20 over to defense counsel by statute, and we're not allowed to do
21 that. And that we're -- they are sufficiently informed, though,
22 because even here what we've done, which we've usually -- we don't
23 do in many distribution counts, we've identified the victim by
24 initials, so that puts them on notice which victim we're talking
25 about.

1 And even though we're doing it by victim, I know that
2 defense counsel -- doing it by initials, I know that from previous
3 discussions defense counsel, they know the full names, so they
4 know exactly which victim we're talking about in each count.

5 THE COURT: Right. No, I get that. And I frankly don't
6 think the date ranges are that difficult to manage. They're not a
7 year. I think most of them are about a month or two. Maybe
8 there's one that's five months. There's one that's a year.

9 MR. JONES: There was one for very long-lasting conduct.

10 THE COURT: You're right. There is one that's at least
11 a year.

12 Let me just -- your proof on -- let's talk about the
13 distribution, okay. Your proof on the distribution counts are --
14 is this something that -- is this an image that he e-mailed to
15 somebody or sent to somebody or posted somewhere?

16 MR. JONES: These are images that he posted either on
17 various forums, either Pornhub or Twitter or Craigslist. And we
18 expect that there's going to be testimony about -- from the
19 victims about the -- for example the Craigslist one, where the
20 victim -- the Government alleges that the defendant posted a
21 Craigslist ad. He took screen shots of a lot of his conduct, and
22 so we have the screen shots from his iCloud account. And there
23 will be testimony from -- the Craigslist ad itself says, I'm into
24 violent gang rape, hit me up if you're interested, and the victim
25 will testify when she got out of school, her phone was blowing up

1 with all these messages from guys saying they were willing to come
2 rape her.

3 THE COURT: Okay. All right. Now, have you given the
4 defendant information from which they know what images were posted
5 when and to where?

6 MR. JONES: Not on the distribution counts. The
7 other -- the production counts, those are just the iCloud --
8 storage that's been inside there on his computer or more than
9 likely on the iCloud account. We haven't identified exactly, but
10 there are only a handful of distribution counts, the conduct, how
11 this is distribution.

12 THE COURT: You have not?

13 MR. JONES: No, we have not given them like any written
14 information. We've given them access to the materials. And I
15 believe that in the materials we showed -- and this is with
16 Ms. Timmers. I believe the materials we showed her included the
17 materials on distribution; for example, the screen grab of Pornhub
18 or Twitter.

19 THE COURT: Okay. So you have a precise posting that
20 supports each one of the distribution counts?

21 MR. JONES: Yes, your Honor.

22 THE COURT: And, I'm sorry, I don't have the indictment
23 right in front of me, I'm not at my desk.

24 Do you have it somewhere handy or do you have to print
25 it? Give me just a second, I'm going to go grab my computer.

1 So let's look at Count 3, which I think is the first
2 distribution count.

3 MR. JONES: Right. I have to admit, I'm at home and I
4 don't have my -- usually I would refer to my prosecution memo to
5 pull me into exactly what the conduct was, and I don't have that
6 in front of me.

7 But I think that the Court is correct, it's 3
8 distribution counts, it looks like it's 3, 6 and 11. I don't
9 recall exactly the conduct that's going on with Count 3. I do
10 recall what's going on with Count 6.

11 THE COURT: Let me go back -- let's talk about Count 6,
12 then.

13 Count 6 says that on one day in particular, July 5th,
14 that he distributed at least one picture of a specific woman or
15 girl, minor female, it doesn't say how he did it and it doesn't
16 say what image. It certainly says when. It doesn't say where and
17 it doesn't say what the image was. But what I understand is that
18 in meetings with Ms. Timmers, you provided her the screen grabs
19 that would identify the image at issue and the location at which
20 it was posted?

21 MR. JONES: Yes, your Honor.

22 THE COURT: And how many -- are there multiple images
23 for these or just one?

24 MR. JONES: I know for Count 6, I believe there are
25 multiple images. I recall -- that one I remember because that's

1 the one where the defendant contacted the minor victim's
2 step-sister, who was an adult, and sent her the -- I think it was
3 more than one image, I think it was several images. And the
4 step-sister actually took -- was the one who took the screen grabs
5 of those and later contacted law enforcement and then that's how
6 we obtained them.

7 THE COURT: Ms. Strickland, is this news to you?

8 MS. STRICKLAND: Your Honor, I have -- well, to answer
9 your question directly sort of, but I have a couple of questions
10 about it.

11 Like when we say that Ms. Timmers was told exactly which
12 images, I mean was she told in a direct manner like that, or was
13 it a situation like when we came in and viewed the iCloud and we
14 just came in and you guys just said, well, here's the iCloud?
15 Does that make sense?

16 MR. JONES: She sat down with -- she sat down with Skye
17 Davis and the case agent going through all of the images and the
18 evidence victim by victim.

19 MS. STRICKLAND: Uh-huh (affirmative).

20 The other things that --

21 MR. JONES: I believe this is before you were on the
22 case.

23 THE COURT: That's the problem with Ms. Timmers having
24 raised this issue and then left town, is we can't ask her that
25 question, which is what's so very inconsiderate of the way in

1 which she approached this.

2 Mr. Jones, how difficult would it be for these three
3 distribution counts, for you to put together a simple notification
4 that says something like Count 6 involves the distribution of
5 various images that -- various images on this -- on the date
6 alleged to X, to this person, the other one involves various
7 images on this date posted to Pornhub saying X or Craigslist
8 saying Y?

9 MR. JONES: For the distribution counts, your Honor,
10 those are very finite and that would be pretty simple to do.
11 Maintaining our position, we believe that would be providing a
12 bill of particulars, but still for the record maintaining our
13 position that we don't believe that a bill of particulars is
14 required legally in this case. But to get to the heart of the
15 question, for the distribution counts, that would be extremely
16 easy to do.

17 THE COURT: So let's do that for distribution. I don't
18 know if it's by way of a bill of particulars or just some
19 notification. It doesn't seem like I need to grant a bill of
20 particulars because you have already provided this to Ms. Timmers,
21 but in an abundance of caution if you could just provide a
22 notification to them with that type of -- we've already got the
23 when, but if you could provide the what posted and the where
24 posted and either do that by a reference to the images or to -- I
25 guess that's the way to do it. Is that the way to do it, image

1 names or something like that?

2 MR. JONES: I think it's more -- the one dealing with
3 Count 6 there's no image name because the defendant sent the
4 images themselves over Facebook to these -- not Facebook, I think
5 it was Kik, over Kik messenger to the step-sister, so they don't
6 come with an image name, but I can still describe the number of
7 images that were sent and a description of the conduct and how
8 they were sent, what medium the defendant used to send them.

9 THE COURT: I think that would be sufficient.

10 MR. JONES: And what alias was -- if there was an alias
11 used. In fact, I think one of these involved Pornhub, and I don't
12 think -- there's no name associated with Pornhub.

13 THE COURT: You have the aliases already identified, and
14 I don't want to create a variance between any of that. So if you
15 just identify the images in some way and the manner of the
16 distribution, I think that would be sufficient.

17 MR. JONES: Okay.

18 THE COURT: Do you agree, Ms. Strickland, that that
19 would be enough?

20 MR. JONES: I'm sorry?

21 THE COURT: I was asking Ms. Strickland if she thinks
22 that would be enough?

23 MS. STRICKLAND: Oh, with the production counts, I think
24 so, as long as it's -- yeah, I was saying as long as it's like a
25 select few images because I think one of the issues that --

1 THE COURT: Hold on, Ms. Strickland. Ms. Strickland,
2 this is the distribution counts, not the production counts.

3 MS. STRICKLAND: Sorry. That's what I meant to say, I'm
4 sorry, that was just a slip of the tongue.

5 THE COURT: Go ahead, finish what you were saying.

6 MS. STRICKLAND: So I was just saying that overall, I
7 think one of the issues that we're having is that there are a lot
8 of photos in various states of undress and part of what we're
9 going to be arguing about possibly is whether they're sexually
10 explicit. So if it's a more finite number of images, then I don't
11 think we'll have a problem, it's just when we get a situation
12 where we've got a whole bunch of images and we're not sure which
13 ones they're saying are sexually explicit.

14 THE COURT: Okay. So that will allow you to -- the
15 level of detail that Mr. Jones is going to give you tied with the
16 fact that he has made the images available to you or will make
17 them available to you again will provide you I think everything
18 you need to address everything you've raised on the distribution
19 counts.

20 MS. STRICKLAND: Yes, as to the distribution counts, I
21 think that's correct, your Honor.

22 THE COURT: So now let's turn to one of the production
23 counts. Let me just read Count 1. Let's take Count 1. Is
24 Count 1 one of the attempted counts? It didn't actually allege
25 that the image was transmitted.

1 MS. STRICKLAND: Your Honor, just -- I have to
2 apologize, I don't have this in front of me either. I am working
3 today, but I am in my car in front of the Hall County Jail, so I'm
4 a little limited to what I have in front of me.

5 MR. JONES: Right. And, your Honor, I don't -- the --
6 Count 1 is definitely -- I know, though, offhand that there are
7 definitely images of the productions there. And there might
8 also -- the attempted portion I believe has to do with
9 oftentimes -- and this probably happened with the victim in Count
10 1, at some point the victim would cut off the defendants, and then
11 there would be various attempts to remake contact and the -- and
12 to re -- get the victim to re-engage in the behavior; or the
13 attempt also can be where the defendant is instructing the victim
14 what to do and -- but the victim doesn't send the photograph or
15 the video, it doesn't do what the defendant was instructing but
16 provides something different.

17 THE COURT: Okay. Well, I agree --

18 MR. JONES: It's extremely messy, your Honor. The
19 attempts can -- sometimes they -- and Ms. Strickland is right,
20 that sometimes there are images that -- the Government would call
21 these child erotica but they're going to be presented because they
22 are necessary to tell a story. But some of the victims,
23 occasionally he would give them to -- send a -- not a child
24 pornography image, but say an image where the girl is wearing a
25 bra and underwear. And then with that it would springboard from

1 that into getting the victim to produce clearly pornographic
2 images.

3 So I agree that -- with Ms. Strickland that there are
4 these images where -- that would not qualify as child pornography,
5 but they're necessary to tell the story about how the defendant
6 got from -- went from image number one and then image two, three
7 and four, which would be child pornography.

8 THE COURT: Give me just one second, I'm just reading
9 over some more.

10 All right. So Count 1 does not say that there was an
11 image made. It says attempted to use or persuade, entice or
12 coerce KD to engage in sexually explicit conduct for the purposes
13 of producing a visual depiction of that conduct knowing that it
14 would be transported in interstate commerce -- oh, no, it does,
15 and it says it was transported, I'm sorry, I didn't read that in
16 that one as I did in the others.

17 So for each of these victims you have a series of images
18 that were sent, is that right?

19 MR. JONES: That's correct, your Honor. That was the --
20 our -- the point that we used to determine whether what would
21 be -- what we're going to charge. So we don't have anybody where
22 it was just strictly, say, child erotica but the victim never --
23 the girl never followed through with any pornographic images. And
24 so with all of these victims we definitely have images of what the
25 Government alleges is child pornography.

1 THE COURT: So, for example, for Count 1, for the victim
2 named KD, how many images are we talking about for KD? Because it
3 seems to me as though this is far different from simply saying he
4 enticed an unknown person to provide images? You have identified
5 KD and that takes it out from being a vague reference that would
6 either be difficult to defend and identify or to protect against
7 double jeopardy. I mean, how many images are there with somebody
8 you've identified as KD?

9 MR. JONES: Again, your Honor, I don't have the file in
10 front of me, but I can say that with all of these -- all of the
11 victims identified in the indictment, there is definitely more
12 than one image. And for some of these there are -- it's -- I
13 think at the very least we're talking for any victim it could be
14 three, four, five, as well as for -- it could be in excess of --
15 depending upon conduct and how long the defendant was in contact
16 with the victim, well over a thousand.

17 THE COURT: Okay. That still is not some -- and you
18 will be -- at trial will the Government have to identify the
19 specific image that it claims was illegal in nature?

20 MR. JONES: I -- well, we're putting -- we intend to put
21 the images into evidence, so I think at that point it's up to the
22 jury based on the instructions the Court gives to determine
23 whether it was illegal in nature. So we're -- so we're not saying
24 that this image would be child erotica and this image would be
25 child pornography.

1 THE COURT: Are you required -- is the jury required to
2 be unanimous as to an image being illegal? Like are they going to
3 be required to determine that an image is illegal child
4 pornography as opposed to erotica?

5 MR. JONES: They definitely -- obviously there's an
6 unanimity requirement, your Honor, but I don't believe they have
7 to go through image by image and say this is child pornography,
8 this is child erotica. They don't have to identify which image
9 that they believe does qualify as child pornography. There is
10 unanimity for the conduct here that the defendant either produced
11 or attempted to produce child pornography.

12 So, yes, there is unanimity but not to the point where
13 they have to identify which image.

14 THE COURT: Ms. Strickland, what do you say about that?

15 MS. STRICKLAND: I would disagree with that, your Honor.
16 I think they have to agree as to which image is sexually explicit.

17 MR. JONES: I would like to see -- having done probably
18 about eight or ten child exploitation trials, I would like to see
19 authority for that because I've never seen that come up before.

20 THE COURT: Okay. Here's what I -- we can address that
21 because I am going to ask for briefing on that as well. I suspect
22 it's not an issue that often comes up. I suspect that most of the
23 cases that are brought, if they get to this point, they involve
24 something that no one would want to stand up and says is not
25 sexually explicit. There might be erotica in there but that -- in

1 the context of all of them that there are some that probably
2 people are not arguing the -- whether they constitute illegal
3 images. I don't know that, I'm just wondering that.

4 But what I would like to do is -- for these images --
5 for example, let's take again KD, Mr. Jones, you have already made
6 available to Ms. Timmers the images at issue with KD, is that
7 right?

8 MR. JONES: That's correct, your Honor.

9 THE COURT: Was it presented to her in a way that she
10 would identify these are the images involving KD?

11 MR. JONES: Yes. All the images were organized -- it
12 wasn't just like a file with all them thrown on, like one disc
13 with all the images thrown on and you click through them. They
14 were actually organized in files by victim initials. So whenever
15 she went to the KD -- the file marked KD, those are the images of
16 KD.

17 THE COURT: And as far as the enticing, using,
18 persuading, this is all done in written form, correct?

19 MR. JONES: Yes, your Honor.

20 THE COURT: So, for example, for all of these folks
21 you've got between the dates alleged a series of electronic chats
22 back and forth with each other in one form or another?

23 MR. JONES: That's correct.

24 THE COURT: And all of that has been made available to
25 the defendant?

1 MR. JONES: That's correct.

2 THE COURT: Ms. Strickland, I'm sort of struggling to
3 understand what else you need?

4 MS. STRICKLAND: Your Honor, just to clarify, we're
5 talking about a different -- none of these images are just coming
6 from the iCloud account? That's more of a question for Mr. Jones.

7 MR. JONES: Are all the images coming from the iCloud
8 account?

9 THE COURT: I thought they were.

10 MR. JONES: Is that your question?

11 I believe that is true for the production counts. For
12 the -- I do know Count 6 that we were talking about, the
13 distribution count, that was not on the iCloud account, that was
14 the step-sister taking screen grabs of her communications.

15 MS. STRICKLAND: Right. So we're not -- you're talking
16 about a different meeting with Ms. Timmers and not the one where I
17 was there and we were shown the iCloud account?

18 MR. JONES: This is before you joined the case.

19 MS. STRICKLAND: Okay. Because as far as the iCloud
20 account, we haven't been told to my knowledge on the iCloud
21 account who was what and how they would be connected to any count.

22 THE COURT: That's not what I understand. I understand
23 that Mr. Jones has -- had some level of a folder system that he
24 made available to Ms. Timmers that said these are the images
25 related to KD, these are the images related to MM.

1 Is that right, Mr. Jones?

2 MR. JONES: That's correct.

3 MS. STRICKLAND: I'm just trying to make sure that I
4 understand because I was confused about that.

5 Okay. Well, if there's a folder for each individual
6 person, I think -- I mean, that helps, but I don't think it solves
7 all of our issues because I think a lot of the problem is going to
8 be the fact -- like Mr. Jones is saying, that this is an ongoing
9 thing and when there are multiple images across multiple dates
10 then I do think we do have the double jeopardy problem.

11 THE COURT: Why? Because what he's alleging is activity
12 throughout this period of time. He is alleging in Count 1 that
13 over a -- about a six-month period, from December '15 to May
14 of '16, that your client induced this girl to produce photos that
15 contained illegal images and that she, in fact, did that and they
16 were transported using an interstate facility. And I think what
17 he's shown you, I think what he's given you and shown you -- and
18 correct me if I'm wrong, Mr. Jones -- is he's given you a series
19 of electronic communications, written out, not just toll records
20 but like chat communication, that he says would show the forcing,
21 employing, using, persuading, inducing, enticing, and then he's
22 given you a series of images that he says are the images.

23 Is that right, Mr. Jones?

24 MR. JONES: That's correct, your Honor.

25 THE COURT: So I don't understand what it is that you're

1 missing. You're going to have to defend against these statements
2 that he says led to these images.

3 MS. STRICKLAND: As far as defending against it, if we
4 know what it is and he has it written out like that, then I don't
5 think that is a problem. I think the problem is that the unit of
6 prosecution of these offenses is -- I had a hard time finding any
7 law directly on point as to what the unit of prosecution is, but I
8 don't think it's a span of much because that's where we have the
9 double jeopardy problem, is that it can be -- or a multiplicity
10 problem even because it has all these images over such a wide time
11 span.

12 THE COURT: Well, hold on. So first of all as to double
13 jeopardy, I think that -- I do think there's a clear demarcation,
14 it's communications between two people during this period of time
15 that led to images that have been identified to you.

16 MS. STRICKLAND: Uh-huh (affirmative).

17 THE COURT: And as to the verdict, if there is a need
18 for unanimity in the verdict as to a specific image or if you
19 believe there is as to the manner, for example, enticing or using,
20 we can deal with that at trial if you have authority to support
21 that position.

22 MS. STRICKLAND: Uh-huh (affirmative).

23 THE COURT: Right?

24 MS. STRICKLAND: Well, I agree with that part, yes.

25 THE COURT: Okay.

1 So I guess, Mr. Jones, the question that would remain to
2 me is how difficult would it be for you to provide additional
3 notice of the images for each of the substantive -- each of the
4 production counts?

5 MR. JONES: That's going to be -- well, what type of
6 notice is the Court asking about?

7 THE COURT: I'm thinking like file names.

8 MR. JONES: File names and the conduct?

9 THE COURT: Just file names.

10 MR. JONES: That's going to be -- pardon me?

11 THE COURT: Just file names.

12 MR. JONES: The file name itself I think would probably
13 be easy enough, but I don't think it's going to satisfy defense
14 counsel if the Government says that file 26439.jpg is -- is --
15 contains what the Government alleges is child pornography.

16 THE COURT: Why?

17 MR. JONES: Because it's just a series of numbers. The
18 file names -- this is not like some other child pornography cases
19 where the file name is descriptive of what the content is.

20 THE COURT: No, no, I get it. I get it, but it is their
21 obligation to arrange a time where they can come see what the
22 image is. And you have to give them the information. You don't
23 have to give them the information in a way that gives it all at
24 one location but -- particularly for double jeopardy. If you were
25 to identify simply the file names, file MMX1, MMX2 through MMX30,

1 that would allow them to come to your office and look at those
2 files and if they want to raise an issue, well, we don't think
3 MMX28 is child pornography, we think it's erotica, then they can
4 do that; or they could say MMX35 was not produced by this woman or
5 MMX32 was not sent in interstate commerce, they could do all of
6 that, it would protect them against double jeopardy later, but it
7 would allow them when they read the chats to have that in mind,
8 and I think it does everything that they're entitled to do.

9 Is there anything that would be lacking from that,
10 Ms. Strickland?

11 MS. STRICKLAND: I -- let's see. I think that would
12 be -- I think that would be very helpful in getting answers to our
13 questions, yes. I still think we might have a problem with the
14 unit of prosecution in the indictment, so I don't necessarily want
15 to say that we don't want to maintain that, but I think if we can
16 identify the images at issue and the conduct -- well, I guess if
17 there's an image that we've confirmed with everything, then
18 identifying the issue (sic), yes, would help us as far as
19 preparing our defense.

20 THE COURT: So, Mr. Jones, I would suggest that's all
21 the Government needs to do. You do not need to try to describe
22 the images in any way. I think you ought to identify the images
23 that you would introduce to the jury as to each count and that you
24 would argue are the images at issue in that count, and then they
25 can arrange -- to the extent that they don't remember and that

1 they want to actually raise an issue about the adequacy of the
2 offending material, they can arrange to come back to your office
3 and review them.

4 But I do agree that this is -- I'm trying to do it in a
5 way that does a couple of things; number one, gives the defendant
6 what I think they need. I'm not -- I think I agree with you,
7 Mr. Jones, the way this has progressed so far is probably
8 unnecessary to grant all of this, but Ms. Timmers has raised the
9 issue. And the way that you have done it with her in the past, it
10 seems like you have provided all of that to her, but for purposes
11 of a record there's no documentation of that. And so if some day
12 a higher court is asked to review it, the fact that you simply say
13 I gave it to Ms. Timmers in a folder -- now at least we have that
14 on the record, but I do think we need to think about a review in
15 case that comes up how would we -- how would it be documented that
16 you did that.

17 So I would -- if it is not overly burdensome, I think
18 the Government ought to list just the image names or some
19 identifier of the image for each one of these counts, and then the
20 defendant can take advantage of their opportunity to come review
21 them again.

22 MR. JONES: Okay. I think that should be pretty easy to
23 do. So the -- I would ask, your Honor, though, that the -- that
24 the -- we be allowed to file this under seal given the fact that
25 we'll be using -- identifying images by victim and still using the

1 initials.

2 THE COURT: That's fine.

3 MR. JONES: But I just want to make sure that it doesn't
4 become a public document that can ever get back to the victim and
5 can be used against the victim somehow.

6 THE COURT: I think that is totally fine. I think
7 that's appropriate to do. Any objection to that, Ms. Strickland?

8 MS. STRICKLAND: Not at all, your Honor.

9 THE COURT: So why don't you do that. I really -- I
10 really want to try to keep this on pace given the victims'
11 situation and their desire to get this behind them, as well as
12 their desire to do this when some of them are home from college
13 and it's less disruptive, and also making sure that the defendant
14 gets that to which he is entitled. And I think that this -- this
15 limited information strikes that right balance.

16 MR. JONES: And, your Honor, just -- I think it's pretty
17 clear from what I was saying earlier, even if we believe there's
18 something -- well, we can agree with defendant that there might be
19 an image that qualifies as child erotica, the Government still
20 intends to introduce it into evidence because we believe that
21 the -- it tells a story about why did -- how the defendant
22 obtained first child erotica but then later got child pornography.

23 THE COURT: 100 percent agreed.

24 MR. JONES: Just by saying something is not child
25 pornography, the Government is not conceding that it is not

1 admissible at trial, it's to let the jury know what's going on in
2 this case.

3 THE COURT: I agree with that. I agree with that. I
4 think that what you need to do is identify the images that would
5 be the basis for a conviction knowing that other images that have
6 been provided or made available -- I guess made available, not
7 provided, made available to the defendant might still be
8 admissible even if not identified in your notification, they might
9 be admissible or would likely be admissible in order to put the
10 relationship in context.

11 MR. JONES: That's right. Okay.

12 THE COURT: All right. So I don't -- I think that the
13 notice you give should be just that subset that you believe would
14 form the basis for a conviction.

15 MR. JONES: Okay. I should be able to put that
16 together.

17 THE COURT: All right. So are we clear --

18 MR. JONES: That and the distribution counts should not
19 be too difficult to put together.

20 THE COURT: All right. Very well. I will -- Mr. Jones,
21 will you -- when will you be providing this?

22 MR. JONES: I'm hoping I can get it done by the end of
23 the week.

24 THE COURT: Okay. That would be great. I want
25 everybody to do what we can to make sure that this trial sticks

1 because of the things that I've said before. And we will be
2 available for that, but I expect everybody to raise issues or
3 concerns expeditiously and we will deal with them in the same
4 manner. I do want you all --

5 MS. STRICKLAND: Your Honor.

6 THE COURT: Yes, go ahead.

7 MS. STRICKLAND: I'm sorry. I did have one other
8 question since we're all here and on the record, and it's for
9 Mr. Jones. Ms. Timmers said that she got a disc in the mail on
10 Friday. I was wondering if that was anything new?

11 MR. JONES: It is but I think it's a demonstrative
12 charge if I recall correctly.

13 MS. STRICKLAND: Demonstrative, okay. Got you. Thank
14 you.

15 MR. JONES: And I'm sure they've encrypted everything,
16 but it's always with the same password.

17 MS. STRICKLAND: Okay. Great. Thank you.

18 THE COURT: So, Mr. Jones, you will identify the images
19 at issue in the production or attempted production counts of the
20 indictment. You will then identify the images and/or means of
21 distribution for the distribution counts.

22 MR. JONES: Yes, your Honor.

23 THE COURT: And, again, it need not be more than the
24 name of the image and/or for the distribution count the name of
25 the image and the platform of publication.

1 MR. JONES: All right.

2 THE COURT: All right. I do want you all, both, to
3 anticipate the need for argument and authority to the Court on the
4 unanimity issue, okay?

5 MS. STRICKLAND: Yes, your Honor.

6 THE COURT: Whether or not the jury is required to be
7 unanimous as to a specific image violating the law, I want you all
8 to be ready to brief this on the first or second day of trial,
9 okay? It might affect -- if the law is against you, Mr. Jones, it
10 might affect the way in which you try the case or the way in which
11 you at least -- are we going to be giving -- we're going to be
12 displaying these images to the jury, right?

13 MR. JONES: Yes, your Honor.

14 THE COURT: I think we talked about it. At that point
15 I'm going to clear the courtroom of anybody else, right?

16 MR. JONES: The Court has the authority to do that to
17 protect the victims, minor victims.

18 THE COURT: I'm going to do that. Unless there's some
19 strenuous objection and basis for it, I'm going to do that.

20 MS. STRICKLAND: I don't believe we have any objection,
21 your Honor.

22 THE COURT: But it might affect -- Mr. Jones, if I were
23 to rule against you, that might be something that you want to know
24 early on because of the way in which you present the images to the
25 jury, so just think about that.

1 MR. JONES: Yes, your Honor, I will.

2 THE COURT: Okay. Thank you all very much.

3 Ms. Strickland, I know this is not something that you
4 brought to us, so I hope that you take my words not towards you.

5 MS. STRICKLAND: Well, thank you, your Honor. And I do
6 appreciate you considering this and getting on the phone with us
7 this morning. I'm sorry to take up so much of the Court's time,
8 and I really do appreciate it. You all have a Merry Christmas.

9 THE COURT: You all, too. Thank you.

10 MR. JONES: Thank you.

11 (PROCEEDINGS REPORTED WERE CONCLUDED)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

I do hereby certify that the foregoing pages are a true and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 10th of January, 2020.

Penny Pritty Coudriet



PENNY PRITTY COUDRIET, RMR, CRR
OFFICIAL COURT REPORTER